Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1995

NACHREINER BOIE ART FACTORY, NANCY NACHREINER and THOMAS NACHREINER,

Petitioners,

v.

THOMAS E. GORIS, NORTHWESTERN MUTUAL LIFE INS. CO., MICHAEL J. SLUTZKY and DANIEL J. STEFFEN,

Respondents.

Petition For A Writ Of Certiorari To The Wisconsin Court Of Appeals, District I

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether claims of fraud in the inducement or misrepresentation, relating to conduct before the existence of a plan, are claims preempted by ERISA and within the exclusive jurisdiction of the federal courts.

2. Whether claims of a 51% owner of a corporation and his wife are claims of "employees" under ERISA and therefore preempted.

PARTIES TO THE PROCEEDINGS

The Petitioners are Nachreiner Boie Art Factory, Ltd., Nancy Nachreiner and Thomas Nachreiner. The Respondents are Thomas E. Goris, Northwestern Mutual Life Insurance Company, Michael J. Slutzky and Daniel J. Steffen. The original plaintiffs in this case are no longer parties in the action.

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PETITION FOR A WRIT OF CERTIORARI

Nachreiner Boie Art Factory, Ltd., Nancy Nachreiner and Thomas Nachreiner respectfully petition this Court for a Writ of Certiorari to the Wisconsin Court of Appeals, District I.

OPINIONS BELOW

The Order of the Supreme Court of Wisconsin denying review is unreported. (App. A at 1a).[1] The Opinion of the Wisconsin Court of Appeals (App. B at 3a) is reported at 201 Wis. 2d. 549, ___ N.W.2d ___ (Ct. App. 1996). The decision of the trial court (App. C at 15a) is not published.

JURISDICTION

The Wisconsin Court of Appeals issued its decision on April 9, 1996. (App. B at 3a). On May 8, 1996 the petitioners filed a timely petition for a review with the Supreme Court of Wisconsin. That court denied the petition on June 11, 1996. (App. A at 1a). This petition is accordingly filed within the time allowed by law and the

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[1] Citations to the trial court record are made by reference to the docket number and paragraph or page number in the form "R. ___, ___." References to documents and transcript pages reproduced in petitioners' appendix are made by reference to the page number of the appendix in the form "App. ___."

jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1144(a) provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. This section shall take effect on January 1, 1975.

29 U.S.C. § 1132(e)(1) provides:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

29 U.S.C. § 1132(a)(1)(B) provides:

> A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

29 U.S.C. § 1002(5) provides:

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(6) provides:

> The term "employee" means any individual employed by an employer.

STATEMENT OF THE CASE

This action was commenced in December of 1992. Initially, Thomas Nachreiner was named as a defendant. Shortly thereafter, Nachreiner Boie Art Factory, Ltd. and Nancy Nachreiner were added as defendants. As a part of their Answer, Affirmative Defenses, Counterclaims and Crossclaims, Nachreiner Boie Art Factory, Ltd., Nancy Nachreiner and Thomas Nachreiner (hereinafter "Nachreiner" or "Claimants") made crossclaims against the Northwestern Mutual Life Insurance Company, Michael J. Slutzky, Daniel J. Steffen, and Thomas E. Goris

(hereinafter "NML Defendants"). (App. D at 30a-38a). Within their crossclaims, the Nachreiner Defendants asserted several state law claims, the gist of which were that the NML Defendants fraudulently and intentionally induced the Nachreiners to enter into various insurance contracts and made misrepresentations upon which the Nachreiner Defendants relied in entering into those insurance policies.

In November of 1994, the court permitted the NML Defendants to amend their responses to the Nachreiner Defendants' crossclaims and they asserted as an affirmative defense that the provisions of ERISA applied. (R. 23).

In April, 1995, the NML Defendants moved the trial court for summary judgment seeking a dismissal of all the Nachreiner Defendants' crossclaims. In a practical sense, this was more a motion to dismiss than a motion for summary judgment. The court found the allegations to be preempted by ERISA. The trial court entered its oral decision granting that motion (App. C at 18a; R. 55) and on June 1, 1995 entered its written order granting the motion for summary judgment and dismissing all crossclaims of the Nachreiners. (R. 45).

Effective April of 1984 the Nachreiner Boie Art Factory, Ltd., (hereinafter "Art Factory") purchased a policy of life insurance, insuring the life of Thomas Nachreiner, from Northwestern Mutual Life Insurance Company (hereinafter "NML"). (R. 32-13). Mr. Nachreiner was a 51% owner of Art Factory. (R. 36-3). Mr. Nachreiner's purpose in having the Art Factory buy this policy was to build up a retirement plan for Mr. Nachreiner. (R. 32-4).

Effective September of 1985, Art Factory purchased a policy insuring the life of Nancy Nachreiner, the wife of Thomas Nachreiner. (R. 32-44). The principal purpose of this policy was also to provide a retirement plan for the Nachreiners. No other individuals benefitted from these two policies. (R. 36-6). By the time this policy was entered into, NML now knew that its agents were misrepresenting facts to NML relating to Nancy Nachreiner in order to qualify to make this sale. (R. 46-3, 4, 5, 6).

Effective December of 1985, a third policy was sold to Art Factory. (R. 32-73). This one provided insurance on the life of Charles Boie, the 49% owner of Art Factory. (R. 32-73; 36-3). This policy (contrary to the ones sold to Mr. and Mrs. Nachreiner, referred to as split dollar policies (R. 32-107, 108)) was to provide funding for a deferred compensation agreement. (R. 32-70).

Effective November of 1986, a split dollar agreement was entered into to provide insurance upon the life of Thomas Stocki, an employee at Art Factory. (R. 32-93).

It is alleged by the Nachreiner claimants that they were induced to enter into each of these policies as a result of misrepresentations made to them by the NML defendants. One of the NML defendants, Mr. Daniel Steffen has pled guilty and been incarcerated as a result of misrepresentations he made to other NML customers while serving as an NML agent. The claimants assert damages based upon the difference between the value of the policies as represented and the actual value of the policies. The Nachreiner defendants asserted state common law claims such as fraud in the inducement and misrepresentation against the NML defendants.

The conduct alleged by the Nachreiners relates to actions of the NML defendants which occurred *prior to* entering into the policies.

REASONS FOR GRANTING THE PETITION

An issue raised in this case is whether conduct which occurs prior to the sale of an insurance policy "relates to" an ERISA plan even though the plan does not then exist.

This is a recurring question and there is a conflict among the circuits. Further, the decision of the Wisconsin Court of Appeals appears to conflict with this court's guidance in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), wherein the court held that ERISA did not preempt the claims there because the applicable state law "only indirectly" affected the plan.

A second issue raised in this case is when is an owner of a corporation not an "employee" under ERISA. Once again, this has been a recurring question where guidance is needed.

I. THERE IS A CONFLICT AMONG THE CIRCUITS.

Fraud in the inducement or misrepresentation claims do not "relate to" the alleged ERISA plan and therefore are not subject to ERISA preemption under 29 U.S.C. § 1144.

In *Martin v. Pate*, 749 F. Supp. 242 (S.D. Ala. 1990), *aff'd*, 934 F.2d 1265 (11th Cir. 1991), the court held that

ERISA did not preempt an insured's fraud in the inducement claim against *an insurer* and *insurance agent* for allegedly misrepresenting that the policy would cover a preexisting condition. Claims of fraud and misrepresentation in the inducement to obtain an agreement to participate in a plan are not preempted by ERISA. These types of claims do not directly affect the regulation of the plan and, by definition, occur prior to the entry into the plan. They are founded on acts preliminary to the adoption of the plan and, therefore, do not fall under ERISA. These types of claims relate to conduct before the claimant was a beneficiary and are not a claim for benefits under the plan. The wrongful conduct occurred before the policy was issued.

In *Martin,* the court found that the applicable state fraud law is one of general application and misrepresentation by insurance companies and their agents are an important state concern. A claim under fraud law does not result in any regulation of the plan, nor does it impact in any way the administration of the policy, which the NML defendants allege to be a plan. What is being regulated is conduct on the part of defendants engaged in prior to the existence of the plan. As a result, the intent behind ERISA's preemption – that being to eliminate the threat of conflicting or inconsistent state and local regulation of employee benefit plans – is not affected.

Several other courts have similarly held that fraud in the inducement claims are not preempted. *See Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied,* 493 U.S. 1093 (1990); *Perkins v. Time Ins. Co.*, 898 F.2d 470, 473 (5th Cir. 1990); *Greenblatt v. Budd Co.*, 666 F. Supp. 735, 742 (E.D. Pa. 1987); *Miller v. Lay Trucking Co.,*

606 F. Supp. 1326, 1333 (N.D. Ind. 1985). The basis of all of these holdings is that

> [t]he mere fact that the subject of an alleged misrepresentation concerns the coverage terms of a contract for insurance which once entered into will constitute an ERISA regulated plan does not render a state law fraud claim premised on such misconduct sufficiently "related to" the benefit plan to warrant preemption.

Martin, 749 F. Supp. at 246.

The claims being asserted here by the petitioners are not post-plan oral modifications. Rather, the petitioners assert claims based upon fraud or misrepresentation occurring before the policy was issued. Because these claims relate to pre-policy conduct, the financial integrity of the plans is not at risk. Therefore, the concern for uniform federal law "relating to" the plan is not entitled to any weight and the claims are not preempted.

In *Johnson v. Antioch Univ.*, 15 E.B.C. 1402, 1992 WL 88028, *6 (D.D.C. 1992), the court held that state law theories are not preempted "where the plaintiff alleges misrepresentations prior to the plan formation and the damages are sought from the insurer" rather than from the plan. The claimants in our case do not seek damages from the plan, but rather from the parties whose fraud induced the claimants.

In *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987), a claim of fraudulent misrepresentation against the employer was not preempted because the fact that the misrepresentation involved pension benefits was only incidental and not essential to the plaintiff's case. In our

case, the misrepresentations involved the advantages of acquiring a policy of life insurance to be used as a retirement plan. The damages are based on the difference between the policy as represented and the actual value of the policy. That is the only connection between the claim and the alleged plan. *See also Bricker v. Maytag Co.*, 450 N.W.2d 839 (Iowa 1990) (in which an equitable estoppel claim based upon an employer's misrepresentations as to pension benefits was not preempted by ERISA because the claim centered on the employer's statement and did not relate to the pension plan itself more than incidentally); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990) (where a hospital's claim under a state deceptive practices statute against an insurance company which had mistakenly confirmed coverage of a patient was not preempted under ERISA because the claim related to the representations and not the plan). Similarly, the claim here relates to representations and not to the alleged plan.

As the court in *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157, 162 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990), noted, "there is respectable authority for positions taken by both parties in this case concerning preemption of state common law claims of fraud, misrepresentation and promissory estoppel." For example, noted in *P*I*E* are several cases in which preemption was found. *See Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981); *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357 (D. Minn. 1988); *Mid America Hotel Corp. v. Bernstein*, 664 F. Supp. 384 (N.D. Ill. 1987). *See also Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992); *Farlow v. Union Cent. Life Ins. Co.*, 874 F.2d 791 (11th

Cir. 1989). This demonstrates the conflict between the circuits and the need for guidance from the Supreme Court. This conflict has also resulted in Wisconsin state courts deciding this important federal question in a way that conflicts with other federal courts.

We believe that the better reasoned position is that preemption does not occur where the claim relates to conduct before the existence of the plan, does not affect the regulation or administration of the plan, and does not amount to a claim for benefits under the plan. Such claims do not relate to any employee benefit plan. Therefore, no preemption occurs and the state courts have jurisdiction.

This court has an interest in evaluating the tension between claims of federal preemption and areas of the law traditionally handled by state courts. The purpose of federal preemption in this arena, as both parties acknowledge and as indicated in the case of *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), is that pension plan *regulation* is to be exclusively a federal concern. The claims asserted by the petitioners are not plan regulation. Perhaps the best proof of this and of the flaws in the NML defendants' argument is the Supreme Court's most recent pronouncement on ERISA preemption. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), the Court held that ERISA did not preempt claims made there because the state law involved affected "only indirectly" the plan there discussed. *Id.* at 1683. As a result, the Court was convinced that the claim did have a *connection* or a *reference* to a plan and it did *affect* a plan *but* its *indirect* effect rendered the claim not sufficiently "related to" the plan. Furthermore,

the claim in *New York State Conference* had nothing to do with plan regulation which is the area reserved exclusively as a federal concern. As a result there was no ERISA preemption. The court reversed the lower court decision and state law claims could proceed.

The same should be true in our case. The NML defendants cannot have their cake and eat it too. They want to assert that this claim relates to an ERISA plan because the way to compute damages in the Nachreiner claims is to subtract the benefits promised from the benefits actually received. By subtracting benefits actually received one will refer to what they call the plan. On the contrary, that is nothing more than a similar, indirect reference to a plan which is not a sufficient connection or reference for preemption purposes. Claims relating to pre-plan conduct do not regulate the plan or impact its administration. Furthermore, there is nothing in the history of ERISA that indicates that Congress intended to upset state law relating to pre-plan conduct.

Clearly, if the claim is not an ERISA claim, then the state courts are not deprived of jurisdiction as a result of ERISA preemption. A claim of fraud in the inducement or misrepresentation is not preempted by ERISA and therefore the state courts are not deprived of jurisdiction. A claim of fraud in the inducement or misrepresentation is clearly a state law claim. The type of claim asserted by the claimants here against the NML Defendants relates to conduct prior to any agreement which is now alleged by respondents to be an ERISA agreement. Petitioners do not agree that the policies here are ERISA plans. Each of these policies was for the benefit of only one individual or that individual's family, plus it provided a death benefit to

repay the corporation for its premium payments. Any such conduct relating to the period of time prior to the entry into the alleged plan is not subject to the ERISA preemption. "[W]here the state law has only an indirect effect on the plan and where it is one of general application which pertains to an area of important state concern, the court should find there has been no preemption." *Provience v. Valley Clerks Trust Fund*, 509 F. Supp. 388, 391 (E.D. Cal. 1981). The Court is respectfully requested to grant this petition and review whether the scope of ERISA preemption includes conduct which occurs before the creation of any ERISA plan.

II. ERISA PREEMPTION DOES NOT APPLY TO THE CLAIMS OF THE OWNER OF THE CORPORATION AND HIS WIFE BECAUSE THEY ARE NOT "EMPLOYEES" UNDER ERISA.

ERISA preemption does not apply to the claims of the owner of the corporation and his wife because they are not "employees" under ERISA. Since the owner and his wife are not "employees" under ERISA, there is no preemption and the state courts have jurisdiction over all of the state common law claims asserted by the Nachreiners in this action.

In *Kelly v. Blue Cross & Blue Shield of Rhode Island*, 814 F. Supp. 220 (D.R.I. 1993), the court held that an owner of a company making a claim that would otherwise be included under ERISA is not an employee under ERISA. As a result, preemption does not occur and state law claims may be pursued. In *Kelly*, the applicable insurance coverage was found not to be part of an employee benefit

plan, at least with respect to the plaintiff, initially Mrs. Kelly and ultimately her husband as personal representative of her estate and in his individual capacity. The plaintiff in *Kelly* was permitted to bring state law claims rather than ERISA claims.

The heart of the court's decision in *Kelly* is as follows:

> Congress enacted ERISA to insure that the private retirement and welfare plans created for employees were not abusively administered or invested. *Donovan,* 688 F.2d at 1370. Such concern prompted the framers of ERISA to provide rights and remedies to employees and their beneficiaries "by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect [to employee benefit plans], by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).
>
> Congress did not intend persons such as Regina Kelly, who owns the corporation which created the employee benefits, to enjoy such rights and remedies.

Id. at 226.

As the First Circuit made explicitly clear in *Kwatcher v. Massachusetts Serv. Employees Pension Fund,* 879 F.2d 957, 959 (1st Cir. 1989), " 'employee' and 'employer' are plainly meant to be separate animals; under Part 1, the twain shall never meet."

The Seventh Circuit has agreed in *Giardono v. Jones*, 867 F.2d 409, 411 (7th Cir. 1989), where the court stated that an "employer cannot ordinarily be an employee or participant under ERISA." In *Kelly*, because the claimant was the owner of the business, the court held that such persons may take advantage of any available state law claims and their claims are not preempted by ERISA. Since they are not preempted by ERISA, the state courts have jurisdiction.

In *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990), the court determined that a partner and his spouse, even though not the only owners of a business, were not employees for purposes of ERISA.

In *Meredith v. Time Ins. Co.*, 980 F.2d 352 (5th Cir. 1993), the court again held that an insurance plan purchased by a sole proprietor covering only herself and her spouse did not constitute an employee welfare benefit plan and, thus, state law claims against the insurer were not preempted by ERISA.

In a series of partner cases, the partner was deemed to be the employer and could not be considered an employee under ERISA. In those cases the partner was not the sole partner. In fact, by definition, a partner has to be a partner with someone else. *See Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990); *Robertson v. Alexander Grant & Co.*, 798 F.2d 868 (5th Cir. 1986), *cert. denied*, 479 U.S. 1089 (1987); *Simpson v. Ernst & Young*, 850 F. Supp. 648 (S.D. Ohio 1994).

The same logic applies in our case. Mr. Nachreiner is the 51% owner of the corporation. A majority owner is an

"employer." Under ERISA, an employer can not also be an employee.

The first policy of insurance was purchased in 1984 on the life of Mr. Nachreiner. No other individuals, whether or not defined as employees, were covered in any way or received any benefit or participated in any way as a result of the acquisition of that policy. In 1985 a policy was purchased on the life of Nancy Nachreiner, his wife. Both of those policies were considered split dollar insurance policies. In 1985 another policy was purchased, this time under the guise of a deferred compensation policy, on the life of Mr. Charles Boie, the other owner of the corporation. Clearly ERISA was not intended to address these particular policies. We are not here talking about retirement plans for all employees of a particular business where one would rightly be concerned about abusive administration or investment of the proceeds of the plan. These policies were each for one individual. The Court is respectfully requested to grant the petition and review the scope of the definition of "employer" and "employee" under ERISA.

CONCLUSION

There is broad preemption under ERISA but the claims made here by petitioners are not caught in the ERISA preemption net. For the above reasons, this court is respectfully requested to grant the petition for a Writ of Certiorari to the Court of Appeals, District I, State of Wisconsin.

Respectfully submitted by:

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August 23, 1996

APPENDIX A

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You are hereby notified that the Court has entered the following order:

No. 95-1848 ***Finn v. Nachreiner Boie Art Factory*** L.C. #92CV17205

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendants-appellants-petitioners, Nachreiner Boie Art Factory, et al., and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1848

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

PETER FINN and PRODUCTION LINE, INC.,

Plaintiffs,

v.

NACHREINER BOIE ART FACTORY, NANCY NACHREINER and THOMAS NACHREINER,

Defendants-Appellants,

THOMAS E. GORIS, NORTHWESTERN MUTUAL LIFE INS., MICHAEL J. SLUTZKY and DANIEL J. STEFFEN,

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County:

MICHAEL J. BARRON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

SCHUDSON, J. Thomas and Nancy Nachreiner and their company, Nachreiner-Boie Art Factory, Ltd. ("Nachreiners") appeal from the order granting summary judgment and dismissing their cross-claims against Northwestern Mutual Life Insurance Company ("NML") and three of NML's agents, Daniel J. Steffen, Michael J. Slutzky and Thomas E. Goris. The Nachreiners asserted fraud in the inducement and misrepresentation claims against NML and its agents in connection with insurance policies the Nachreiners purchased. The trial court dismissed the Nachreiners' cross-claims on the grounds that they were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").

The Nachreiner's appeal raises two issues: (1) whether ERISA preempts state law claims for fraud in the inducement, and for misrepresentation; and (2) whether, if ERISA preemption applies to such claims, the Nachreiners fall within the "employee-owner" exception to ERISA preemption because Mr. Nachreiner is a 51% owner of the corporation. We conclude that the Nachreiners' cross-claims are preempted by ERISA. We further conclude that the limited employee-owner exception to ERISA preemption applies only to sole proprietors or sole shareholders and, therefore, not to the Nachreiners.

I. BACKGROUND

This case has its genesis in the termination of a business relationship between Peter Finn and Production Line, Inc., and the Nachreiners. The Finn claims have

been resolved and are not at issue here. This appeal involves only the dismissal of the Nachreiners' cross-claims against NML, Steffen, Slutzky and Goris.

Thomas Nachreiner was president of the Nachreiner-Boie Art Factory, and one of its two shareholders and directors. On April 1, 1984, Mr. Nachreiner and the Art Factory entered into an agreement according to which he was to receive certain retirement benefits. As part of the agreement, the Art Factory purchased a NML "split dollar" life insurance policy and was to pay the premiums.[1] The excess cash value accumulated under the NML policy was to be the source of retirement income for Mr. Nachreiner. In exchange, Mr. Nachreiner was to pay back the premiums at his death or upon surrender of the policy.

The April 1, 1984 agreement between Mr. Nachreiner and the Art Factory stated: "This Agreement is intended to qualify as a life insurance employee benefit plan. . . . " Additionally, the agreement stated that it is "intended to meet the requirement of Employee Retirement Income Security Act of 1974." Consistent with those requirements, the agreement designates a plan "fiduciary" and establishes a claims procedure for resolving disputes over benefits due under the Agreement. *See* Employee Retirement Income Security Act (ERISA) §§ 402(a)(1) & 503, 29 U.S.C. §§ 1102(a)(1) & 1133. Further, on October 1, 1984,

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[1] The NML defendants state, and the Nachreiners do not dispute, that "[s]plit dollar life insurance generally refers to arrangements between an employer and an employee whereby interests in and proceeds payable under a whole life insurance policy are split and premiums may be split."

Mr. Nachreiner, as plan fiduciary, signed a disclosure document entitled, "Employee Benefit Plan Statement of Disclosure, Acknowledgment, and Disclosure," which stated that its purpose was "to comply with all requirements of the Employee Retirement Income Security Act of 1974 (ERISA) for disclosure, acknowledgment, and approval in connection with the sale of insurance or annuity contracts to employee benefit plans." (Capitalization in original omitted.)

In September, 1985, the Art Factory entered into a similar "split dollar" agreement with Nancy Nachreiner, who was employed as a bookkeeper at the Art Factory. Like Mr. Nachreiner's agreement, the split dollar policy was intended to provide a source of retirement income benefits and life insurance protection. Mrs. Nachreiner's agreement was almost identical to her husband's, containing the same recitals regarding the nature of the plan, and providing for a plan fiduciary and a claims procedure. On September 24, 1985, Mrs. Nachreiner executed an ERISA disclosure statement identical to the one her husband signed.

On November, 26, 1985, the Art Factory and Charles Boie, vice-president and also a shareholder and director of the Art Factory, executed a "Defferred [sic] Compensation Agreement." This agreement provided for disability payments and for payments to Mr. Boie or his named beneficiary in the event he retired, terminated his employment, or died. The payments were to be funded by a NML policy issued for Mr. Boie and paid for by the Art Factory. Additionally, Mr. Nachreiner executed an ERISA disclosure form for Mr. Boie, identical to those that he and his wife had executed.

On November 25, 1986, the Art Factory entered into a "Split-Dollar Insurance Agreement" with Thomas Stocki, an employee who managed the company's sales. Similar to the others, Mr. Stocki's agreement provided that the Art Factory would purchase and hold a life insurance policy on his life, and that the policy was intended to be a source of retirement income. Mr. Nachreiner also executed an ERISA disclosure form for Mr. Stocki, identical to the other disclosure forms.

Although the Nachreiners pled various cross-claims against the NML respondents, on appeal they only pursue the fraud in the inducement and misrepresentation cross-claims that alleged:

> 15. In the years 1984 through 1991, NML defendants . . . made certain false and fraudulent representations to Thomas Nachreiner, Nancy Nachreiner or Art Factory concerning the policies wherein the NML defendants stated to Thomas Nachreiner, Nancy Nachreiner or Art Factory that Art Factory was a business suitable for the plan funded through the policies and that the shareholders of Art Factory were eligible to benefit from that plan; that the NML defendants structured the plan for Art Factory which would be funded through the policies and provide for investment returns for the shareholders of Art Factory and that said returns would exceed alternative forms of investment; that the NML defendants were experts in planning for and achieving high investment returns for businesses such as Art Factory by obtaining tax advantages and special benefits available only to small business owners willing to defer compensation into a "retirement

plan" funded by cash values of life insurance policies issued by NML; that the policies were essentially investment contracts which would receive preferential federal and state tax treatment and therefore outperform alternative investments while at the same time providing death benefits as an ancillary benefit; and that the policies were a simple means of investment planning which required virtually no complex administration and would produce superior economic results in comparison to alternative investment or retirement plans, among other things.

16. In truth and fact, the policies did not cover the investment needs of and meet the promises of the NML defendants for Thomas Nachreiner, Nancy Nachreiner or Art Factory.

17. Thomas Nachreiner, Nancy Nachreiner and Art Factory, believing in the skill, experience and honesty of the NML defendants, relied upon their representations, and thereby were induced to purchase and did purchase continue [sic] the Art Factory policies and paid the NML defendants substantial sums of money. The NML defendants made the representations with the knowledge of their falsity and with the intent to induce Thomas Nachreiner, Nancy Nachreiner and Art Factory to rely thereon.

The trial court granted the summary judgment motions of the NML respondents and dismissed the Nachreiners' cross-claims, concluding that ERISA preempted such claims. The trial court also concluded that the Nachreiners did not fall within the employee-owner exception to exclusive federal court jurisdiction.

II. ANALYSIS

The Nachreiners raise no issue regarding any "genuine issue as to any disputed material fact." *See* § 802.08(2), STATS. They challenge only the trial court's legal conclusions. Our review is *de novo*. *See* ***Peterman v. Midwestern Nat'l Ins. Co.,*** 177 Wis.2d 682, 691, 503 N.W.2d 312, 315 (Ct. App. 1993).

A. Does ERISA preempt the Nachreiners' state law cross-claims for fraud in the inducement and misrepresentation?

The provisions of ERISA applicable to the issues in this case are 29 U.S.C. §§ 1132(e)(1) and 1144(a). 29 U.S.C. § 1132(e)(1) provides:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.[2]

29 U.S.C. § 1144(a), provides:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall

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[2] 29 U.S.C. § 1132(a)(1)(B) provides, "A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan."

> supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan* described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)].

(Emphasis added.)

The Nachreiners argue that ERISA preemption is inapplicable because the Art Factory purchased four separate policies, which were not part of an "employee benefit plan." The Nachreiners also argue that even if the policies constitute a "plan," the alleged misconduct of the NML defendants occurred prior to the time the policies were issued and, therefore, their cross-claims about that misconduct do not "relate to" any ERISA plan. In support of that second argument, the Nachreiners contend that the alleged tortious conduct of the NML defendants: (1) does not affect regulation or administration of a plan; (2) does not amount to a claim for benefits under the plan because damages were sought from the insurer; and, (3) "does not relate to the polic[ies] more than incidentally." We reject the Nachreiners' arguments.

First, the four policies constitute an "employee benefit plan." They all were paid for by the Art Factory and funded by NML policies, and all were intended to secure retirement benefits and insurance coverage. The express terms of the agreements and disclosure statements demonstrate that each policy was to be part of an employee benefit retirement plan in compliance with ERISA and the requirements of 29 U.S.C. § 1002(1) & (2) (defining "pension plan" as a plan that provides retirement income or results in the deferral of income to the employment termination or beyond; defining "welfare plan" as a plan providing, among other things, life insurance benefits).

Second, the case law from the United States Supreme Court and the Seventh Circuit Court of Appeals emphasizes Congress's purpose in preempting state law and " 'establish[ing] pension plan regulation as exclusively a federal concern.' " *See* ***Pilot Life Ins. Co. v. Dedeaux,*** 481 U.S. 41, 45-46 (1987); ***Tolle v. Carroll Touch, Inc.,*** 977 F.2d 1129, 1136 (7th Cir. 1992) (citation omitted); ***Pohl v. National Benefits Consultants, Inc.,*** 956 F.2d 126, 128 (7th Cir. 1992) ("Not the semantics of the word, 'relate,' but the policy of the statute requires preemption."); *see also* ***Gibson v. Prudential Ins. Co.,*** 915 F.2d 414, 416 (9th Cir. 1990). ("The ERISA preemption provision is to be broadly construed and extends to common law tort and contract actions."). This is particularly so with regard to fraud in the inducement claims. *See* ***Anderson v. Humana, Inc.,*** 24 F.3d 889, 890-892 (7th Cir. 1994); *see also* ***Consolidated Beef Indus., Inc. v. New York Life Ins. Co.,*** 949 F.2d 960, 963-964 (8th Cir. 1991) (rejecting "pre-plan" argument against ERISA preemption), *cert. denied,* 503 U.S. 985 (1992); ***Farlow v. Union Cent. Life Ins. Co.,*** 874 F.2d 791, 792-794 (11th Cir. 1989).[3] Therefore, we conclude that the

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[3] We acknowledge, as the Nachreiners point out, that the authorities are divided on the issue of whether fraud in the inducement and misrepresentation claims are preempted under ERISA. Among the cases cited by the Nachreiners are: ***Perkins v. Time Ins., Inc.,*** 898 F.2d 470 (5th Cir. 1990); ***Perry v. P*I*E Nationwide, Inc.,*** 872 F.2d 157 (6th Cir. 1989), *cert. denied,* 493 U.S. 1093 (1990); ***Martin v. Pate,*** 749 F. Supp. 242 (S.D. Ala. 1990), *aff'd,* 934 F.2d 1265 (11th Cir. 1991); ***Greenblatt v. Budd Co.,*** 666 F.Supp. 735 (E.D. Pa. 1987); ***Miller v. Lay Trucking Co.,*** 606 F. Supp. 1326 (N.D. Ind. 1985). We conclude, however, that the reasoning of the case law adhering to a broader interpretation of "relates to" is more persuasive given Congress's effort to provide ERISA with wide preemptive power.

trial court correctly concluded that the Nachreiners' fraud in the inducement and misrepresentation cross-claims are preempted by ERISA law.[4]

B. Does the employee-owner exception to ERISA preemption apply to the Nachreiners?

The Nachreiners also argue that because Mr. Nachreiner is a 51% owner of the Art Factory, they are not "employees" under ERISA and, therefore, that ERISA does not preempt their state law cross-claims. The NML defendants respond that the Art Factory is the "employer" and that, despite Mr. Nachreiner's status as majority shareholder, he and Mrs. Nachreiner are Art Factory "employees" under ERISA.

Although in common terms a person in Mr. Nachreiner's position might be considered both an employee and employer, for ERISA purposes, " '[e]mployee' and 'employer' are plainly meant to be separate animals; . . . the twain shall never meet"[5] ***Kwatcher v. Massachusetts Service Employees Pension Fund,*** 879 F.2d 957,959 (1st Cir. 1989). The ERISA definition of "employee" as "any individual employed by an employer," *see* 29 U.S.C. § 1002(6), offers little assistance

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[4] The Nachreiners also argue that because there were individual agreements and separate policies, they did not form a "plan," and, therefore, ERISA is somehow inapplicable. We reject their argument as insufficiently briefed. *See* ***Polan v. DOR,*** 147 Wis.2d 648, 660, 433 N.W.2d 640, 645 (Ct. App.1988).

[5] *See also* ***Giardono v. Jones,*** 867 F.2d 409, 411 (7th Cir. 1989) ("employer cannot ordinarily be an employee or participant under ERISA").

in determining Mr. Nachreiner's status. 29 C.F.R. § 2510.3-3(c)(1) (1996), which exempts from ERISA coverage certain types of employees, is more illuminating. It states:

> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is *wholly owned* by the individual and his or her spouse.

(Emphasis added.)[6]

In support of their argument, the Nachreiners cite ***Kwatcher***, as well as ***Meredith v. Time Ins. Co.***, 980 F.2d 352 (5th Cir. 1993), ***Giardono v. Jones***, 867 F.2d 409 (7th Cir. 1989), and ***Kelly v. Blue Cross & Blue Shield***, 814 F. Supp. 220 (D.R.I. 1993). In all of these cases, the courts held that the litigants were "employers." All of these cases, however, involved sole proprietors or sole shareholders. The Nachreiners have not cited, and we have not located any case law establishing that a 51% owner "and

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[6] In ***Nationwide Mutual Ins. Co. v. Darden***, 503 U.S. 318 (1992), the United States Supreme Court, under a factual scenario completely different from the one presently before us, criticized ERISA's "nominal definition of 'employee' as 'any individual employed by an employer,' 29 U.S.C. § 1002(6)," and adopted a common-law test for determining who qualifies as an employee under ERISA. *See* ***id.*** at 323-324. We conclude, however, that the ***Darden*** test is inapplicable in the present situation and instead rely on the definition contained in 29 C.F.R. 2510.3-3(c)(1).

his or her spouse shall not be deemed to be employees" under ERISA. *See* 29 C.F.R. § 2510.3-3(c)(1).[7]

We conclude that because the Nachreiners do not "wholly own[]" the Art Factory, they are not "employers" for purposes of exemption from ERISA preemption. Therefore, we conclude that the trial court correctly determined that the Nachreiners were Art Factory employees whose cross-claims fell within the federal court exclusive jurisdiction by virtue of ERISA preemption.

By the Court. – Order affirmed.

Recommended for publication in the official reports.

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[7] The Nachreiners also cite ***Harper v. American Chambers Life Insurance Co.***, 898 F.2d 1432 (9th Cir. 1990), in support of their argument that they are "employers" under ERISA. ***Harper*** involved a partnership, and the Ninth Circuit Court of Appeals held that "partners" could not be "employees" under ERISA. Given that 29 C.F.R. § 2510.3-3(c)(2) makes specific reference to partners and here we are not dealing with a partnership, we do not find ***Harper*** to be particularly instructive.

APPENDIX C

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 8

PETER FINN and
THE PRODUCTION LINE, INC.,

Plaintiff,

-vs- Case No. 92-CV-17205

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, MICHAEL J. SLUTZKY, DANIEL J. STEFFEN, THOMAS E. GORIS, NACHREINER-BOIE ART FACTORY, LTD., NANCY NACHREINER and THOMAS NACHREINER,

Defendants.

MAY 22, 1995 HONORABLE MICHAEL J. BARRON
Circuit Judge Presiding

* * *

APPEARANCES

RANDALL L. NASH, appeared on behalf of Nachreiner-Boie Art Factory, Nancy Nachreiner and Thomas Nachreiner.

L. WILLIAM STAUDENMAIER & KATHLEEN RIVERA, appeared on behalf of Northwestern Mutual Life Insurance Company.

RICHARD J. SANKOVITZ, appeared on behalf of Daniel Steffen.

TERRENCE B. KELLY, appeared on behalf of Michael Slutzky and Thomas Goris.

* * *

Kelly Janowski – Official Court Reporter

[p. 2] PROCEEDINGS

(The following transcript is an excerpt of the proceedings held on May 22, 1995.)

THE COURT: I'm convinced on the basis of what I have read and what the record shows – and that's unrelated to representations that are made here today by lawyers because it's not part of the record; that is, whatever Mr. Krueger said. All we have is the lawyer's assertion as to what he said. It's not really part of the record – that this Court lacks subject matter jurisdiction.

I don't think there's any question about it in my judgment at least, and the reason I don't is because of the federal law where there's only a certain limited types of cases that would be available for a state court to try involving federal law. And none of the causes of action in this case are in that limited concurrent jurisdictional provision.

Why the Congress decided that state court judges would be prohibited from trying state – excuse me – cases involving federal law, I don't know.

All we know is what the statute says. There are many, many areas in which federal law is [p. 3] applied right here in this courtroom let alone others throughout this nation.

But in the ERISA type cases, they apparently provide exclusive jurisdiction within the federal courts with very limited exceptions none of which are involved in this case.

And the reason that I lack subject matter jurisdiction is because there is a preemption in my judgment for all of the claims that we have here. They all relate to the governance of the ERISA law which preempts other types of claims being made.

Now, there are some federal courts apparently that agree with the position of Mr. Nash's clients concerning fraud in the inducement.

But as I looked at those cases, I think the better law is on the majority of the cases which includes the Seventh Circuit where even fraud in the inducement does, in fact, relate to an ERISA plan.

And so it's pretty clear that in the event that they do relate to an ERISA plan – and I'm convinced on the basis of what's been submitted that they do. And that's whether you got one insurance policy, two insurance policies or 18 insurance policies, that they all relate.

[p. 4] And once that happens and they all concern the Art Factory here I don't think there's any question that federal law preempts those kinds of claims and that you have to make your determination within the confines, number one, of whatever ERISA permits; and, number two, even if you do, you have to do it in the federal court and not here in state court.

So on the basis of – I agree with the so called NML defendants' position 100 percent. And those cross-claims

whether they are Nachreiner or anyone else who had purchased or are beneficiaries of any of these NML policies they don't have any cause of action.

There's also no indication of any intentional interference with the contractual relationship. Nothing to indicate that that was any factor, any cause of action to be taken up here.

All the rest of them directly relate to ERISA. The only two that possibly might not have are the two I just mentioned: Allegedly fraud in the inducement and the intentional interference with contractual relationship.

So unfortunately the Nachreiners even if they have, in fact, a viable case as I see it [p. 5] federal law preempts my doing anything on this case, both from an ERISA standpoint and from a subject matter standpoint.

So that's the end of the case.

MR. STAUDENMAIER: One of us will prepare the order, Your Honor.

THE COURT: Okay.

MR. SANKOVITZ: Thank you, Judge.

MR. NASH: Thank you, Judge.

(Whereupon, the proceedings were concluded.)

* * *

STATE OF WISCONSIN)
)
MILWAUKEE COUNTY)

I, KELLY JANOWSKI, an official court reporter in and for the State of Wisconsin, do hereby certify that the foregoing transcript consisting of 6 pages, has been carefully transcribed to the best of my ability from my stenographic notes as taken by myself in machine shorthand, and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 1st day of June, 1995.

/s/ Kelly Janowski
Kelly Janowski – Official
Court Reporter

APPENDIX D

CIRCUIT COURT
STATE OF WISCONSIN MILWAUKEE COUNTY

PETER FINN and
THE PRODUCTION LINE, INC.,

Plaintiffs,

Case No. 92-CV-017205

v.

Code No. 30703

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, MICHAEL J. SLUTZKY, DANIEL J. STEFFEN, THOMAS E. GORIS, NACHREINER-BOIE ART FACTORY, LTD., NANCY NACHREINER and THOMAS NACHREINER,

Defendants.

ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS AND CROSS CLAIMS

NOW COME the defendants, Nachreiner-Boie Art Factory, Ltd., Nancy Nachreiner and Thomas Nachreiner, by and through their attorneys, O'Neil, Cannon & Hollman, S.C., and as and for an answer to the allegations of the complaint, state and allege as follows:

1. With respect to the allegations of paragraph 1, admit said allegations.

2. With respect to the allegations of paragraph 2, admit said allegations, except affirmatively allege that The Production Line, Inc. engaged in the business of

finishing commercial art for reproduction and that its last principal place of business was located at 13500 Watertown Plank Road, Suite L-107, Elm Grove, Wisconsin. Further affirmatively allege that the proper name of the plaintiff corporation is The Production Line, Inc.

3. With respect to the allegations of paragraph 3, admit said allegations.

4. With respect to the allegations of paragraph 4, deny information sufficient to form a belief as to the truth of said allegations as to Mr. Slutzky's addresses and put plaintiffs to their proof, admit the balance of the allegations.

5. With respect to the allegations of paragraph 5, deny information sufficient to form a belief as to the truth of said allegations as to Mr. Steffen's addresses and put plaintiffs to their proof, admit the balance of the allegations.

6. With respect to the allegations of paragraph 6, deny information sufficient to form a belief as to the truth of said allegations and put plaintiffs to their proof.

7. With respect to the allegations of paragraph 7, admit said allegations.

8. With respect to the allegations of paragraphs 8 and 9, admit said allegations.

9. This is the second paragraph of plaintiff's complaint numbered 8. These allegations through paragraph 18 are denominated allegations common to claims against NML defendants. Therefore, no response is so required from these defendants.

10. With respect to the allegations of paragraph 19, admit that Steffen pled guilty on June 29, 1992 to certain criminal charges in the Eastern District of Wisconsin, Case No. 92-CR-102, and that the admitted criminal wrongdoing was in connection with certain activities as an insurance agent for NML.

11. With respect to the allegations of paragraph 20, admit said allegations.

12. With respect to the allegations of paragraph 21, admit the allegations of the first sentence and deny the allegations of the second sentence.

13. With respect to the allegations of paragraph 22, 23 and 24, deny said allegations.

14. With respect to the allegations of paragraph 25, deny the allegation of exclusive control over the books and records, but admit the balance of said allegations.

15. With respect to the allegations of paragraphs 26-41, deny said allegations.

16. With respect to the allegations of paragraph 42, admit said allegations contained in the first sentence. With respect to the second sentence, deny that in each and every instance Art Factory was to pay the fair market value of said goods and services.

17. With respect to the allegations of paragraph 43, deny said allegations.

18. With respect to the allegations of paragraphs 44-55, deny that a response by these defendants is necessary.

19. With respect to the allegations of paragraph 56, deny said allegations.

20. With respect to the allegations of paragraph 57, deny said allegations.

21. With respect to the allegations of paragraph 58, deny said allegations.

22. With respect to the allegations of paragraph 59, deny said allegations.

23. With respect to the allegations of paragraph 60, admit said allegations.

24. With respect to the allegations of paragraph 61, deny said allegations.

25. With respect to the allegations of paragraph 62, deny that these allegations state the entries owed by the Nachreiners to the corporation or to Finn.

26. With respect to the allegations of paragraph 63, deny said allegations.

27. With respect to the allegations of paragraph 64, deny said allegations.

28. With respect to the allegations of paragraph 65, deny said allegations.

29. With respect to the allegations of paragraph 66, deny said allegations.

30. With respect to the allegations of paragraph 67, deny information sufficient to form a belief as to the truth thereof and therefore deny the same and put plaintiffs to their proof.

31. With respect to the allegations of paragraph 68, admit said allegations.

32. With respect to the allegations of paragraph 69, deny information sufficient to form a belief as to the truth thereof and therefore deny same and put plaintiffs to their proof.

33. With respect to the allegations of paragraph 70, deny said allegations.

34. With respect to the allegations of paragraph 71, deny said allegations accurately state the duties of Nachreiner to Production Line or to Finn.

35. With respect to the allegations of paragraph 72, deny said allegations.

AFFIRMATIVE DEFENSES

As and for Affirmative Defenses, these defendants in the above-referenced action state and allege as follows:

1. This court lacks jurisdiction over this matter.

2. Plaintiffs have failed to state a claim upon which relief can be granted.

3. These defendants' actions are protected by the Business Judgment Rule.

4. These defendants exercised due diligence and fairness.

5. Plaintiffs ratified the acts of these defendants.

6. Plaintiffs were contributorily negligent.

7. Proper venue of allegations against these defendants is in Waukesha County.

8. Plaintiffs' allegations against these defendants are frivolous under chapter 814.

9. The claims of plaintiffs against these defendants should be bifurcated from the claims against the remaining defendants.

COUNTERCLAIM

As and for a counterclaim against the plaintiffs, the defendants, Nachreiner-Boie Art Factory, Ltd., Thomas Nachreiner and Nancy Nachreiner, herein allege and show as follows:

1. Nachreiner-Boie Art Factory Ltd. ("Art Factory") is a Wisconsin corporation which at all times relevant hereto has engaged in the business of commercial illustration and design with its principal place of business located at 925 Elm Grove Road, Elm Grove, Wisconsin.

2. Production Line, Inc. ("Production Line") is a business corporation organized and existing under the laws of the state of Wisconsin, and at all tines relevant hereto has been engaged in the business of finishing commercial art for reproduction with its last principal office located at 13500 Watertown Plank Road, Suite L107, Elm Grove, Wisconsin 53122.

3. Nancy Nachreiner is an adult resident of the state of Wisconsin whose current home address is N6 W30662 Mohawk Trail, Waukesha, Wisconsin. At all times relevant hereto, Nancy Nachreiner was a bookkeeper employed by both Production Line and Art Factory.

Nancy Nachreiner is also the wife of defendant Thomas Nachreiner.

4. Thomas Nachreiner is an adult resident of the state of Wisconsin whose current home address is N6 W30662 Mohawk Trail, Waukesha, Wisconsin. Among other things, Nachreiner now is, and at all times relevant hereto, has been a principal officer and 50% shareholder in Production Line.

5. Peter Finn is an adult resident of the state of Wisconsin whose current home address is 1942 Forest Street, Wauwatosa, Wisconsin. Among other things, and now is and at all times relevant hereto, has been a principal officer and 50% shareholder in Production Line.

6. The corporation has an even number of directors, that is four directors, who are equally divided respecting the management of its affairs.

7. Serious differences of opinion have arisen between the board of directors in the conduct and management of the business affairs of the corporation and its corporate affairs with the result that the business and good will of the corporation are in immediate danger of irreparable impairment.

8. On December 9, 1992, Mr. Finn admittedly transferred $18,000 from Production Lines' checking account, leaving approximately $5,000 in the corporation account to allegedly cover outstanding checks and ordinary obligations. Mr. Finn also relocated the physical assets of the corporation for his personal use.

9. By reason of said equal division of stock, there is a deadlock in the board of directors, and it is impossible

to select a new board of directors. In addition, Mr. Finn has made slanderous and untrue statements about Art Factory and Thomas and Nancy Nachreiner with the intent to injure them.

10. Production Line is at present able to pay all of its obligations to third parties in due course, provided that the assets and $18,000 distribution remain in the corporation's checking account.

11. There are matters outstanding at present relating to Production Line which exceed the $5,000 amount left in the corporation account by Mr. Finn.

12. Wherefore, these counterclaimants pray for a final order of this court dissolving said corporation and for a receiver to be appointed with all of the powers and duties that the court directs, that other action be taken to preserve corporate assets, wherever located, and to carry on the business of the corporation until a full hearing can be had, and for such further relief as may be proper with the costs of this proceeding.

MISAPPROPRIATION/CONVERSION

13. Counterclaimants reallege and incorporate by reference paragraphs 1 through 12 as alleged herein.

14. Upon information and belief, on December 9, 1992, Mr. Finn, without notice to Thomas and Nancy Nachreiner secretly, covertly and over the objection of Thomas and Nancy Nachreiner, transferred funds from the corporate checking account and assets from the corporation.

15. The transferring of such assets left the corporation without sufficient funds to pay its outstanding debts and obligations and violated the duties of loyalty Mr. Finn owed Production Line, Thomas Nachreiner and Nancy Nachreiner.

16. Upon information and belief, Mr. Finn has no intention of returning said assets to the corporate checking account and to the corporation.

CONSPIRACY

17. Counterclainants reallege and incorporate by reference all of the allegations contained in paragraphs 1 through 16 as alleged herein.

18. Upon information and belief, during December 1992 and before, Mr. Finn conspired with others and acted to divert the assets and earnings of the corporation from legitimate corporate purposes and from Thomas and Nancy Nachreiner in order to further Mr. Finn's own private interests and to injure Thomas and Nancy Nachreiner. Mr. Finn has violated section 134.01, Wis. Stat., to the injury and damage of Thomas and Nancy Nachreiner.

BREACH OF FIDUCIARY DUTY, INTERFERENCE AND NEGLIGENCE

19. Counterclaimants reallege and incorporate by reference all of the allegations contained in paragraphs 1 through 19 as alleged herein.

20. Mr. Finn had a fiduciary duty to Production Line and to Thomas and Nancy Nachreiner to discharge

his duties and responsibilities in the best interests in the corporation and not to interfere with the business relationships of Art Factory and Thomas and Nancy Nachreiner.

21. Mr. Finn has breached his duties to Thomas and Nancy Nachreiner, Production Line and Art Factory.

NEGLIGENCE

22. Finn was negligent by, among other things, allegedly relying upon the acts and representations of others of which he complains, causing injury to Thomas and Nancy Nachreiner.

WHEREFORE, these counterclaimants demand judgment for:

1. A final order of this court dissolving said corporation and for a receiver to be appointed with all of the powers and duties that this court directs, that other action be taken to preserve corporate assets, wherever located, and to carry on the business of the corporation until a full hearing can be had, and for such further relief as may be proper with the costs of this proceeding;

2. For dissolution, the appointing of a receiver and for other just and equitable relief as may be appropriate as related to the judicial dissolution of the corporation;

3. For an order compelling Mr. Finn to repay funds to the corporation;

4. For an order compelling Mr. Finn to relocate the assets of the corporation;

5. For this court to take proceedings which may be required to liquidate the assets and business of Production Line pursuant to Wis. Stat. § 180.771;

6. For the suspension or removal of Mr. and Mrs. Finn from the corporation and to take other proceedings which may be required to appoint and install a director or officer pursuant to Wis. Stat. § 776.32;

7. For Mr. Finn to account for their official conduct in the management and disposition of the funds and property pursuant to Wis. Stat. § 776.32 and to enjoin Mr. Finn from undertaking other acts related to Production Line, including enjoining slanderous statements about these defendants and counterclaimants and enjoining any use by Mr. Finn of the name or assets of Production Line; and

8. For the award to Thomas and Nancy Nachreiner of damages, costs, and disbursements, together with reasonable attorneys' fees plus other and further relief as this court may deem just and equitable.

CROSS CLAIM

As and for a cross claim against the Northwestern Mutual Life Insurance Company, Michael J. Slutzky, Daniel J. Steffen, and Thomas E. Goris (NML defendants), Thomas Nachreiner, Nancy Nachreiner, and Nachreiner-Boie Art Factory, Ltd. herein allege and show as follows:

1. Repeat the allegations of paragraphs 1, 3, and 4 of the counterclaim as if fully stated again.

2. Defendant, Northwestern Mutual Life Insurance Company ("NML"), is a life insurance company licensed

and authorized to conduct business as such in the state of Wisconsin with its principal place of business located at 720 East Wisconsin Avenue, Milwaukee, Wisconsin.

3. Michael J. Slutzky ("Slutzky") is an adult resident, whose current home address is 1421 North Port Washington Road, Mequon, Wisconsin, and at all times relevant hereto Slutzky was an authorized agent and servant of NML and defendant, Thomas E. Goris ("Goris"), with his places of business located at 633 East Mason Street, Milwaukee, Wisconsin, 723 North Van Buren Street, Milwaukee, Wisconsin 53202 and 7545 North Port Washington Road, Milwaukee, Wisconsin.

4. Daniel J. Steffen ("Steffen") is an adult resident of the state of Wisconsin whose home address is 3010 West Sholes Drive, Mequon, Wisconsin, and at all times relevant hereto was an authorized agent and servant of NML and Goris and did business under the name of Professional Benefit Planning with his principal place of business located at 7545 North Port Washington Road, Milwaukee, Wisconsin. Upon information and belief, Steffen is no longer engaged in the insurance business, and has admitted criminal wrongdoing associated with his position at NML.

5. Goris is an adult resident of the state of Wisconsin, and at all times relevant hereto was an authorized general agent and servant of NML d/b/a The Goris Agency with its places of business located at 633 East Mason Street, Milwaukee, Wisconsin, 723 North Van Buren Street, Milwaukee, Wisconsin 53202 and 7545 North Port Washington Road, Milwaukee.

6. Production Line was organized and chartered in 1985. At that time, Thomas Nachreiner had a pre-existing relationship with Slutzky and Steffen as insurance agents who had sold NML policies to Thomas Nachreiner and/or Art Factory.

7. At all times relevant hereto, Slutzky and Steffen held themselves out to Art Factory, Thomas Nachreiner and Nancy Nachreiner as possessing special knowledge and expertise in financial matters beyond that of a "typical" insurance agent. Slutzky and Steffen sought to establish and succeeded in establishing a special relationship of trust, confidence and professional stature with Art Factory, Thomas Nachreiner and Nancy Nachreiner.

8. In 1984 and thereafter, NML defendants sold to Art Factory, Thomas Nachreiner and Nancy Nachreiner policies for the express and stated purpose of providing tax-advantaged investment vehicles which would yield to Art Factory, Thomas Nachreiner and Nancy Nachreiner a substantial annual return on their total investment; cash value significantly in excess of premiums paid; and substantial amounts of life insurance death benefits as a feature ancillary to the projected investment returns at essentially no extra cost.

9. In order for the policies to provide the sort of benefits promised by the NML defendants to Thomas Nachreiner, Nancy Nachreiner and Art Factory, certain suitability and eligibility standards, as well as borrowing against the policies' cash values and reinvesting the proceed would have to be undertaken.

10. Thomas Nachreiner, Nancy Nachreiner and Art Factory did not meet such suitability and eligibility standards, and such standards were not disclosed to said parties at any time by any of the NML defendants. The need to undertake borrowing and reinvesting also was not disclosed to said parties at any time by any of the NML defendants.

11. From 1984 through 1991, Art Factory paid over $100,000 of premiums in connection with the policies.

12. On June 29, 1992, defendant Steffen pled guilty to certain criminal charges in the Eastern District of Wisconsin, Case No. 92-CR-102, and that the admitted criminal wrongdoing was in connection with certain activities as an insurance agent for NML.

FIRST CAUSE OF ACTION

CHURNING

13. Slutzky, Steffen, Goris and NML (collectively the "NML defendants") caused or allowed the policies to be issued, surrendered, replaced and/or supplemented in such a manner that one or more policies was issued unnecessarily without the promised benefits to Thomas Nachreiner, Nancy Nachreiner or Art Factory, but creating substantial commission income to the NML defendants at great cost and damage to Nancy Nachreiner, Thomas Nachreiner and Art Factory.

14. The substantial cost and expense to the Nachreiners and Art Factory, which corresponded to the issuance and/or replacement and/or supplementation of

the policies, was neither disclosed nor explained to the Nachreiners or Art Factory by the NML defendants.

SECOND CAUSE OF ACTION

FRAUDULENT AND INTENTIONAL MISREPRESENTATION

15. In the years 1984 through 1991, NML defendants, in Milwaukee County, state of Wisconsin, made certain false and fraudulent representations to Thomas Nachreiner, Nancy Nachreiner or Art Factory concerning the policies wherein the NML defendants stated to Thomas Nachreiner, Nancy Nachreiner or Art Factory that Art Factory was a business suitable for the plan funded through the policies and that the shareholders of Art Factory were eligible to benefit from that plan; that the NML defendants structured the plan for Art Factory which would be funded through the policies and provide for investment returns for the shareholders of Art Factory and that said returns would exceed alternative forms of investment; that the NML defendants were experts in planning for and achieving high investment returns for businesses such as Art Factory by obtaining tax advantages and special benefits available only to small business owners willing to defer compensation into a "retirement plan" funded by cash values of life insurance policies issued by NML; that the policies were essentially investment contracts which would receive preferential federal and state tax treatment and therefore outperform alternative investments while at the same time providing death benefits as an ancillary benefit; and that the policies were a simple means of investment planning which required virtually no complex administration and would produce

superior economic results in comparison to alternative investment or retirement plans, among other things.

16. In truth and fact, the policies did not cover the investment needs of and meet the promises of the NML defendants for Thomas Nachreiner, Nancy Nachreiner or Art Factory.

17. Thomas Nachreiner, Nancy Nachreiner and Art Factory, believing in the skill, experience and honesty of the NML defendants, relied upon their representations, and thereby were induced to purchase and did purchase continue the Art Factory policies and paid the NML defendants substantial sums of money. The NML defendants made the representations with the knowledge of their falsity and with the intent to induce Thomas Nachreiner, Nancy Nachreiner and Art Factory to rely thereon.

18. By reason of defendants' misrepresentations as herein alleged, plaintiffs have been damaged in a sum to be determined at trial.

THIRD CAUSE OF ACTION

NEGLIGENT MISREPRESENTATION

19. To the extent that the misrepresentations described in the preceding cause of action above were not made intentionally, they were made negligently.

FOURTH CAUSE OF ACTION

NEGLIGENCE

20. The NML defendants owed to cross-claimants certain statutory and common law duties, but breached such duties by, among other things, (i) failing intentionally or negligently to exercise that standard of care which they owed to cross-claimants to disclose to them all information of material significance relating to the policies, and (ii) after creating a complex investment structure for the cross-claimants, failing to provide the necessary instructions, advice, counsel and caution to cross-claimants to enable them to preserve the tax-advantage characteristics of the policies.

FIFTH CAUSE OF ACTION

NEGLIGENT SUPERVISION

21. Goris and NML owed to cross-claimants a duty to reasonably supervise the agents that sold and continued NML policies to the public under their auspices.

22. Goris and NML breached that duty described in the preceding paragraph by, among other things, negligently or intentionally failing to provide adequate supervision over Slutzky and Steffen; and failing to determine the suitability of the Art Factory for the plan and policies recommended by Slutzky and Steffen.

SIXTH CAUSE OF ACTION

BREACH OF CONTRACT

23. NML defendants issued written and/or oral statements to cross-claimants showing certain life insurance coverage premiums paid or to be paid therefor and stated that such insurance coverage was only an ancillary and not the primary benefit compared to the investment and tax advantages of said policies. NML defendants, in writing and/or verbally, made representations about the retirement benefits and/or investment benefits of said policies. Based upon defendants' representations, cross-claimants entered into contracts for insurance with the defendants.

24. In consideration of the statements of defendants, cross-claimants agreed to pay premiums, and cross-claimants paid therefor sums of money greater than $100,000.

25. Defendants breached the contracts by not providing cross-claimants with the agreed-upon benefits.

26. As a direct and proximate result of defendants' breach of contract, cross-claimants have sustained damages in an amount not less than $100,000.

SEVENTH CAUSE OF ACTION

BREACH OF IMPLIED CONTRACT

27. An implied term of the contracts comprised by or relating to the policies was an obligation by the parties to deal with one another in good faith.

28. The NML defendants breached their contracts with cross-claimants by, among other things, failing to deal with cross-claimants in good faith and failing to determine and disclose that Art Factory was not a business suitable for the deferred compensation plan, such as that which the NML defendants created for the cross-claimants and funded with the policies.

EIGHTH CAUSE OF ACTION

INTERFERENCE WITH BUSINESS RELATIONS, ATTORNEYS' FEES AND COSTS

29. By reason of the NML defendants' actions, cross-claimants have been sued by Peter Finn and Production Line and, therefore, have additional losses of attorneys' fees and costs in defending those claims. Further, by reason of the NML defendants' actions, they have interfered with the business relationship between Thomas and Nancy Nachreiner and Peter Finn and Production Line, and between Art Factory and Production Line.

Wherefore, cross-claimants demand judgment against the NML defendants as follows:

1. For actual damages to be determined at trial;

2. For punitive damages;

3. For attorneys' fees and costs; and

4. For such other and further relief as the court deems appropriate under the circumstances.

Dated at Milwaukee, Wisconsin this 18th day of January, 1993.

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Supreme Court, U.S.
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No. 96-322

In the Supreme Court of the United States

OCTOBER TERM, 1996

NACHREINER BOIE ART FACTORY,
NANCY NACHREINER AND THOMAS NACHREINER,

Petitioners,

v.

THOMAS E. GORIS, THE NORTHWESTERN MUTUAL LIFE INS. CO., MICHAEL J. SLUTZKY AND DANIEL J. STEFFEN,

Respondents.

On Petition for a Writ of Certiorari to the Wisconsin Court of Appeals

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, preempts state-law claims of fraud in the inducement and misrepresentation arising in connection with (but before the adoption of) an employee benefit plan.

2. Whether a majority (51%) stockholder of a corporation is an "employee" for purposes of ERISA.

RULE 29.6 STATEMENT

Respondent, The Northwestern Mutual Life Insurance Company, has the following subsidiaries (other than wholly owned subsidiaries): MGIC Investment Corporation, The Grand Avenue Corporation, and Baird Financial Corporation. The latter are indirect subsidiaries.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The petition in this case raises two issues decided by an intermediate appellate court in Wisconsin, neither of which merits review by this Court. The first issue -- whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"), preempts state-law claims of fraud in the inducement and misrepresentation arising in connection with (but before the adoption of) an employee benefit plan — is largely academic here because the vast majority of the misrepresentations alleged by petitioners occurred *after* the adoption of the benefit plan in this case. Moreover, putting aside this glaring factual and pleading impediment, the decision below is consistent with the decisions of this Court, the federal courts of appeals are now moving toward a uniform view on the question, and the Wisconsin Supreme Court has yet to address the issue on the merits. There is plainly no need for review by this Court of the decision in this case.

The second issue raised by petitioners — whether a majority (51%) stockholder of a corporation is an "employee" for purposes of ERISA — is even less worthy of review. The exception to ERISA established for *sole* proprietors and *sole* stockholders has never been applied to a majority stockholder by any court, state or federal. Petitioners offer no reason why this Court should reach out to decide an issue that was correctly decided by an intermediate state appellate court and that has generated no confusion — indeed, not a contrary precedent — in the lower courts. The petition should be denied.

STATEMENT

1. Petitioner Nachreiner Boie Art Factory, Ltd. ("Art Factory") purchased from respondent The Northwestern Mutual Life Insurance Co. ("Northwestern") a series of life insurance policies for certain employees as part of a benefit plan established by Art Factory. Pet. App. 5a. The first policy was issued under the plan in April 1984 to petitioner

Thomas Nachreiner, who owned 51% of the stock and was president of Art Factory. Under the terms of an Agreement between Art Factory and Nachreiner, dated April 1, 1984, Art Factory purchased from Northwestern a policy insuring Nachreiner, and Art Factory agreed to pay the policy premiums. The excess cash value accrued under the policy "was to be the source of retirement income for Mr. Nachreiner." *Ibid.* The Agreement between Nachreiner and Art Factory provided that it was "'intended to qualify as a life insurance employee benefit plan'" and was "'intended to meet the requirement[s] of Employee Retirement Income Security Act of 1974.'" *Ibid.* Nachreiner was designated the "plan fiduciary" under ERISA. *Id.* at 6a.

Over the next several years, Art Factory entered into virtually identical agreements with three other employees, each providing life insurance issued by Northwestern that "was intended to provide a source of retirement income benefits and life insurance protection." Pet. App. 6a. For example, Nachreiner's wife, petitioner Nancy Nachreiner, who was a bookkeeper for Art Factory, received an insurance policy from Northwestern in September 1985 under an agreement with Art Factory that "was almost identical to her husband's, containing the same recitals regarding the nature of the plan, and providing for a plan fiduciary and a claims procedure." *Ibid.* Charles Boie, a co-owner (49% of the stock) and a director of Art Factory along with Thomas Nachreiner, executed a similar agreement with Art Factory in November 1985 providing employee benefits, including an insurance policy issued by Northwestern. *Ibid.*; Pet. 5. And Thomas Stocki signed a similar agreement with Art Factory in November 1986 under which he received a life insurance policy issued by Northwestern and paid for by Art Factory. Pet. App. 7a.

2. Petitioners were sued in the Circuit Court for Milwaukee County, Wisconsin in December 1992 by some former business partners. Pet. 3-4; Pet. App. 3a-5a. In

response, petitioners cross-claimed against respondents, Northwestern and three individual Northwestern agents, alleging various state-law causes of action related to the insurance policies issued by Northwestern under Art Factory's employee benefit plan. Petitioners' cross-claims included fraudulent and intentional misrepresentation, negligent misrepresentation, negligence, negligent supervision, breach of contract, breach of implied contract, and interference with business relations. *Id.* at 30a-38a.

Respondents moved for summary judgment on petitioners' cross-claims, arguing that they were preempted by ERISA, which "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *." 29 U.S.C. § 1144(a). The trial court granted the motion and dismissed petitioners' claims against respondents as preempted, finding "that they do relate to an ERISA plan." Pet. App. 17a-18a.

Although the underlying action involving petitioners and their former business partners was settled, petitioners appealed the dismissal of their cross-claims against respondents. Pet. App. 5a.

3. In the Wisconsin Court of Appeals, petitioners abandoned all of their claims against respondents except the "fraud in the inducement and misrepresentation" claims. Pet. App. 7a, 34a-35a. The heart of petitioners' case, as described by the Court of Appeals (*id.* at 7a), was an allegation that respondents had made fraudulent statements to petitioners over the course of seven years while issuing insurance policies under Art Factory's employee benefit plan. Thus, petitioners' cross-claim alleged (*id.* at 34a):

> In the years 1984 through 1991, [respondents] * * * made certain false and fraudulent representations to Thomas Nachreiner, Nancy Nachreiner or Art Factory concerning the policies wherein the [respondents] stated to Thomas Nachreiner, Nancy Nachreiner or Art

> Factory that Art Factory was a business suitable for the plan funded through the policies and that the shareholders of Art Factory were eligible to benefit from that plan; that the [respondents] structured the plan for Art Factory which would be funded through the policies * * *.[1]

Petitioners urged the Court of Appeals to reverse the trial court's preemption decision on three grounds. First, petitioners claimed that "ERISA preemption is inapplicable because the Art Factory purchased four separate policies, which were not part of an 'employee benefit plan.'" Pet. App. 10a. Second, they argued that, even if the policies constituted a "plan," the "misconduct" by respondents "occurred prior to the time the policies were issued and, therefore, their cross-claims about that misconduct do not 'relate to' any ERISA plan." *Ibid.* Third, the Nachreiners asserted "that because Mr. Nachreiner is a 51% owner of the Art Factory, they are not 'employees' under ERISA and,

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[1] Petitioners alleged, among other things, that respondents stated they were "experts in planning for and achieving high investment returns for businesses such as Art Factory by obtaining tax advantages and special benefits available only to small business owners," that the insurance policies issued under Art Factory's employee benefit plan were "essentially investment contracts which would receive preferential federal and state tax treatment," and that the insurance policies "were a simple means of investment planning which required virtually no complex administration and would produce superior economic results in comparison to alternative investment or retirement plans." Pet. App. 34a-35a.

Petitioners further alleged that these representations by respondents were knowingly false when made and that petitioners "relied upon the[se] representations, and thereby were induced to purchase and did purchase continue *[sic]* the Art Factory policies and paid the [respondents] substantial sums of money." Pet. App. 35a.

therefore, that ERISA does not preempt their state law cross-claims." *Id.* at 12a.

The Court of Appeals rejected these arguments. First, the court held that "the four policies constitute an 'employee benefit plan.' They were all paid for by the Art Factory and funded by [Northwestern] policies, and all were intended to secure retirement benefits and insurance coverage." Pet. App. 10a. Moreover, "[t]he express terms of the agreements and disclosure statements demonstrate that each policy was to be part of an employee benefit retirement plan in compliance with ERISA." *Ibid.*; *id.* at 12a n.4.

Second, the court concluded that petitioners' fraud in the inducement and misrepresentation claims were preempted by ERISA. Following the reasoning of courts that have "reject[ed the] 'pre-plan' argument against ERISA preemption," the court held that petitioners' claims "relate to" the employee benefit plan adopted by Art Factory. Pet. App. 11a-12a. The court disagreed with the analysis of decisions that have found no preemption of "pre-plan" misrepresentations claims, concluding that "the reasoning of the case law adhering to a broader interpretation of 'relates to' is more persuasive given Congress's effort to provide ERISA with wide preemptive power." *Id.* at 11a n.3.

Third, the court held that Mr. Nachreiner's 51% ownership interest in Art Factory did not change his status as an "employee" for purposes of ERISA. Pet. App. 13a-14a. The court distinguished cases holding that "sole proprietors or sole shareholders" are employers and observed that "[t]he Nachreiners have not cited, and we have not located any case law establishing that a 51% owner" of a corporation is an employer whose claims are not subject to ERISA. *Ibid.*

The Court of Appeals therefore affirmed the judgment of the trial court. Pet. App. 14a. Petitioners sought review of all three issues in the Supreme Court of Wisconsin, which denied their petition. *Id.* at 2a.

REASONS FOR DENYING THE PETITION

1. Petitioners ask this Court to decide "whether conduct which occurs prior to the sale of an insurance policy 'relates to' an ERISA plan [and is therefore preempted] even though the plan does not then exist." Pet. 6. Petitioners contend that this case involves fraudulent statements and misrepresentations by respondents *before* the adoption of an ERISA plan by Art Factory. *Ibid.* And they assert both that there is "a conflict among the circuits" over the question whether "pre-plan" claims of fraud are preempted and that the Wisconsin Court of Appeals — which found such claims preempted — answered that question incorrectly. *Ibid.* In addition, petitioners suggest that the decision below "appears to conflict" with this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995).

a. The threshold problem with the petition on this issue is that petitioners' factual allegations are not readily squared with the legal question they now seek to raise in this Court. Petitioners have consistently argued in the courts below that respondents made fraudulent statements concerning each of the *insurance policies* issued by Northwestern. Moreover, they have maintained throughout the litigation that there was no single employee benefit "plan" of which the insurance policies were a part. Instead, petitioners assert that there were simply four separate insurance policies issued by Northwestern and that, at most, each policy constituted a separate ERISA "plan."

Indeed, petitioners state at the outset of their petition to this Court "that they were induced to enter into *each of the[] [Northwestern insurance] policies* as a result of misrepresentations made to them by [respondents]." Pet. 5 (emphasis added). They have alleged in particular that over the course of seven years — from "1984 through 1991" (Pet. App. 34a) — respondents "made certain false and fraudulent representations to [petitioners] * * * *concerning the policies*

wherein the [respondents] stated * * * that Art Factory was a business suitable for the plan funded through *the policies* * * *" (*ibid.* (emphases added)).

In short, petitioners' state-law claims for fraud in the inducement and misrepresentation are predicated on the allegation that respondents made "false and fraudulent" statements in connection with the sale over several years of *each of the insurance policies* issued by Northwestern. And petitioners vigorously disputed in the trial court and on appeal that there was a single "plan." Pet. for Review at 18-19 ("[t]he [Northwestern] defendants argue that there is only one plan here, but that is simply not true"). They argued to the Wisconsin Supreme Court in their petition for review that "[t]here were four separate policies sold" and "that these were four separate plans as [Northwestern] uses the word. Each plan had a different name. Each plan related to only one policy of insurance." *Id.* at 19.

The insuperable problem for petitioners now is that the Wisconsin Court of Appeals conclusively resolved this issue against them, finding that there was only one plan: "the four policies constitute an 'employee benefit plan.'" Pet. App. 10a.[2] Petitioners' request for review of this determination by the Wisconsin Supreme Court was denied (Pet. App. 2a) and they have not sought review in this Court of that plainly case-specific determination. Petitioners are therefore bound by the ruling below that there was one ERISA "plan" — comprised of the four insurance policies. And this "plan" was adopted no later than April 1, 1984, when the first agreement was executed by Thomas Nachreiner and Art Factory and provided for the issuance of an insurance policy by

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[2] This determination is completely consistent with the allegation in petitioners' cross-claim that the alleged misrepresentations in this case concerned "the *plan funded through the policies*." Pet. App. 34a (emphasis added).

Northwestern. That policy, in turn, was dated April 3, 1984. See pages 1-2, *supra*.

The conclusive determination by the courts below that there was only one ERISA "plan" adopted by Art Factory severely undermines petitioners' state-law tort claims because virtually all of the allegedly fraudulent statements and misrepresentations by respondents occurred *after* the adoption of the "plan" in early April 1984. Indeed, petitioners have never specified any particular statement by any one of the respondents that occurred before April 1, 1984, and they effectively concede that there were no fraudulent statements at all by respondents before 1984. Pet. App. 34a. Instead of focusing on "pre-plan" conduct by respondents before April 1984, petitioners have chosen to focus on alleged "pre-policy conduct" over the course of seven years.

These concessions and pleading deficiencies are fatal to petitioners' argument that ERISA does not preempt their state-law claims, because they have previously conceded — as they must — that claims based on misrepresentations and fraudulent statements made *after* the adoption of a plan are preempted by ERISA. See *Farr* v. *US West, Inc.*, 58 F.3d 1361, 1366 (9th Cir. 1995) ("state law claims challenging fraudulent statements about the nature of a benefits plan itself are preempted by ERISA") (citing cases); see also *Anderson* v. *Humana, Inc.*, 24 F.3d 889 (7th Cir. 1994); *Pohl* v. *National Benefits Consultants, Inc.*, 956 F.2d 126 (7th Cir. 1992); *Washington Nat'l Ins. Co.* v. *Hendricks*, 855 F. Supp. 1542 (W.D. Wis. 1994). In fact, before the Wisconsin Court of Appeals, petitioners themselves distinguished those "cases holding that fraud in the inducement claims are preempted by ERISA in situations where a plan is already in existence. As a result, those claims relate to a broader course of conduct and dealings between the parties. That is not so here." Reply Br. of Defendants-Appellants at 3. Here, petitioners argued, there was no "plan," only "four separate policies

sold." *Id.* at 4. But the Wisconsin Court of Appeals rejected this argument and that determination is final and conclusive.

It is now too late for petitioners — who litigated this case on the premise that respondents made fraudulent statements before the insurance *policies* were issued — to change horses. They litigated and lost in the courts below the question whether each policy was a separate "plan." Now in this Court, they try to avoid the consequences of that decision by blurring the distinction between "pre-plan" and "pre-policy" conduct. They argue that there is an important legal question brewing in the lower courts over whether state-law claims based on fraudulent statements made before a "plan" was adopted are preempted by ERISA. Their cross-claims in this case, however, are not premised on allegations of "pre-plan" fraud. Their claims are premised, at bottom, on allegations of "pre-policy" fraud occurring after the ERISA plan was adopted.

In sum, even if this Court were to agree with petitioners that state-law claims of fraud in the inducement and misrepresentation arising before an employee benefit plan was adopted are not preempted by ERISA, petitioners would not benefit from that holding because their claims against respondents are premised on the faulty notion that each insurance policy in this case was a separate plan. Petitioners have not identified any specific fraudulent statements or misrepresentations by any of the respondents before the actual "plan" in this case — as opposed to the individual policies — was adopted. The question presented is therefore academic and its disposition by this Court would not affect the substantial rights and liabilities of the parties to the case.

b. Even if the question sought to be raised by petitioners were not hypothetical, the decision below on ERISA preemption does not merit review. First, the decision petitioners challenge was rendered by an intermediate Wisconsin appellate court. Because the Wisconsin Supreme Court declined to grant review, the decision below does not

represent a judgment on the merits by that Court and is therefore not the final word on the issue even within the State of Wisconsin. See *Southern Cross, Inc.* v. *John*, 193 Wis.2d 644, 647, 533 N.W.2d 188, 189-190 (1995) ("discretion" of Wisconsin Supreme Court in reviewing petitions for review is "similar to that exercised by the United States Supreme Court when dealing with writs of certiorari" and denial of petition "does not establish the law of the case nor amount to res judicata on the points raised"); *Wisconsin* v. *Johnson*, Nos. 95-0266-CR, 95-0382-CR, 1996 Wisc. App. LEXIS 56, at *4 (Wisc. Ct. App. Jan. 18, 1996) (noting that conflicts among the decisions of the Wisconsin Court of Appeals "are becoming increasingly common").

Second, the decision below is entirely consistent with this Court's decisions on ERISA preemption. Under 29 U.S.C. § 1144(a), federal law "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *." Congress' purpose in preempting state law under this section was "to establish pension plan regulation as exclusively a federal concern." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987) (quotation marks omitted). And in interpreting the ERISA preemption provision, this Court has held that the words "relate to" must be given their "broad common-sense meaning" and that a law "relates to" a plan if it has "a connection with or reference to * * * a plan." *Id.* at 47 (quotation marks omitted). State common law claims are included within the scope of the preemption provision. *Id.* at 48; see *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987).

Here, petitioners' claims, by their own admission, "relate to" the employee benefit plan adopted by Art Factory. They assert that "the way to compute damages in the Nachreiner claims is to subtract the benefits promised from the benefits actually received" under the plan. Pet. 11. By computing damages in this manner, however, petitioners

directly affect the amount of benefits that will be paid under the plan. This is not a case like *New York State Conference of Blue Cross & Blue Shield*, 115 S. Ct. at 1678-1680, where the Court held that state statutes of broad general applicability were not preempted by ERISA because they had only a speculative and indirect effect on the costs of health care services offered under certain ERISA plans. In the case of Art Factory's plan, by contrast, petitioners' state-law tort claims (if proven) would directly affect the benefits actually available under that ERISA plan.

Third, the conflict in the circuits cited by petitioners is, in fact, narrowing. Of the four circuits identified by petitioners, only the Eighth Circuit now appears to hold that pre-plan fraud and misrepresentation claims are preempted, see *Consolidated Beef Indus., Inc.* v. *New York Life Ins. Co.*, 949 F.2d 960, 964 (1991), cert. denied, 503 U.S. 985 (1992). And the Eighth Circuit — which gave the issue only cursory attention as an alternative to its primary holding that the plaintiff's claims related to whether the employee benefit plan at issue "was properly administered" (*ibid.*) — based its ruling on the Eleventh Circuit's decision in *Farlow* v. *Union Cent. Life Ins. Co.*, 874 F.2d 791, 794 (1989). The Eleventh Circuit, however, recently overruled *Farlow*, see *Morstein* v. *National Ins. Servs., Inc.*, 93 F.3d 715 (1996) (en banc), and joined the Fifth and Sixth Circuits in finding "pre-plan" fraud and misrepresentation claims are not preempted by ERISA. See *Perkins* v. *Time Ins. Co.*, 898 F.2d 470 (5th Cir. 1990); *Perry* v. *P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), cert. denied, 493 U.S. 1093 (1990). Whether or not these decisions are correct — and respondents continue to believe they are not — there is not at the present time the kind of circuit split that warrants review by this Court.

In sum, the division in the circuits identified by petitioners is diminishing and may well disappear without this Court's intervention. There is no need for the Court to reach out to review an intermediate state court opinion on the issue,

particularly in a case that is supported by a dubious factual predicate.

2. The second issue raised in the petition is clearly meritless. Petitioners assert that because Thomas Nachreiner owns 51% of the stock of Art Factory, he "and his wife * * * are not 'employees' under ERISA. Since the owner and his wife are not 'employees' under ERISA, there is no preemption and the state courts have jurisdiction over all of the [petitioners'] state common law claims." Pet. 12. The Wisconsin Court of Appeals rejected this argument as unsupported by any precedent. Pet. App. 12a-14a. Moreover, petitioners' assertion is flatly contradicted by the terms of the agreement between Art Factory and Mr. Nachreiner, which specified that it was "'intended to qualify as a life insurance employee benefit plan'" and was "'intended to meet the requirement[s] of Employee Retirement Income Security Act of 1974.'" Pet. App. 5a.

Under ERISA, "[a]n employer cannot ordinarily be an employee or participant" in an ERISA plan. *Giardono* v. *Jones*, 867 F.2d 409, 411 (7th Cir. 1989). Therefore, "[o]nce a person has been found to fit within the 'employer' integument, ERISA prohibits payments to him from a qualified plan." *Kwatcher* v. *Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989). The statute defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan * * *." 29 U.S.C. § 1002(5).

The Department of Labor has adopted a regulation that interprets this provision to exempt from ERISA coverage certain employees who wholly own the businesses in which they are employed. 29 C.F.R. § 2510.3-3(c)(1) ("[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business * * * which is *wholly owned* by the individual and his or her spouse"). Consistent with this regulation, the federal courts have

uniformly held that *sole proprietors* and *sole stockholders* are "employers" and not "employees" for purposes of ERISA. See, *e.g.*, *Meredith* v. *Time Ins. Co.*, 980 F.2d 352, 353-358 (5th Cir. 1993); *Kwatcher*, 879 F.2d at 958-961; *Peckham* v. *Board of Trustees*, 653 F.2d 424, 427 (10th Cir. 1981); *Kelly* v. *Blue Cross & Blue Shield of Rhode Island*, 814 F. Supp. 220, 226-227 (D.R.I. 1993).

Petitioners seek to overcome this unbroken line of cases by citing "a series of partner cases," in which a "partner was deemed to be the employer and could not be considered an employee under ERISA." Pet. 14 (citing *Harper* v. *American Chambers Life Ins. Co.*, 898 F.2d 1432 (9th Cir. 1990); *Robertson* v. *Alexander Grant & Co.*, 798 F.2d 868 (5th Cir. 1986), cert. denied, 479 U.S. 1089 (1987)). Applying the "logic" of the "partner cases," in which "by definition, a partner has to be a partner with someone else" (Pet. 14), petitioners argue that Mr. Nachreiner, as a 51% stockholder, is in effect a "partner" with his fellow stockholder (*id.* at 14-15).

Petitioners' "logic" is faulty because partners and stockholders are *not* treated the same in fact or in law for ERISA or for many other purposes. In particular, the Department of Labor has adopted a regulation (29 C.F.R. § 2510.3-3(b), (c)(2)) providing that "ERISA does not apply to retirement plans which cover only partners." *Simpson* v. *Ernst & Young*, 850 F. Supp. 648, 664 (S.D. Ohio 1994); see *Harper*, 898 F.2d at 1433; *Robertson*, 798 F.2d at 870-871. In the corporate setting, however, the Department exempts only *sole stockholders*. See 29 C.F.R. § 2510.3-3(c)(1); page 12, *supra*. In light of these precedents, the court below found that petitioners' reference to the partnership exemption from ERISA was not "particularly instructive." Pet. App. 14a n.7.

At the end of the day, petitioners cite no case in which a court treated a stockholder — other than a sole stockholder — as an "employer" for purposes of ERISA. In fact, the

lower court decisions are uniform in finding the "employer" exception applicable only to sole proprietors and stockholders. Petitioners offer no plausible reason why this Court should grant review and disturb these settled precedents. The petition should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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